THE SUPERIOR OIL COMPANY
TRANSOCEAN OIL INC.

IBLA 70-123 Decided July 18, 1973

Appeal from decision (GS-40-O&G) of Director, Geological Survey, on base to be used in computing federal royalties and exclusion of certain barging costs in such computation.

Affirmed in part and reversed in part.

Words and Phrases

> The word "or" is to be given its normal disjunctive meaning, unless such a construction renders the provision repugnant to other provisions in the instrument.

Words and Phrases

> The term "average value" means average fair market value where the context so requires.

Contracts: Construction and Operation: Generally -- Contracts: Performance or Default: Acceptance of Performance

> The practical interpretation of an instrument, sounding in contract, by the parties thereto is always a consideration of great weight in construing the instrument. Where the parties have followed a course of conduct over a period of years, with respect to a provision of the instrument which is not free from ambiguity, that course of conduct will control the meaning of the provision.

Contracts: Construction and Operation: Construction against Drafter

> Even where there are two possible and reasonable meanings of a provision of an instrument, sounding in contract, such provision will be construed, under the doctrine of contra proferentem, against the party who chose the words.

Federal Employees and Officers: Generally -- Federal Employees and Officers: Authority to Bind Government

Reliance by a private party on misinformation given to him by a federal employee cannot confer any right not authorized by law. However, where royalty payments, based upon the actual sales prices received by the lessee, have been accepted by a federal officer over a period of years, and such base for royalty is permissible under the regulations and is within the ambit of such officer's authority to establish, the Government is bound by such acceptance.

Oil and Gas Leases: Production -- Outer Continental Shelf Lands Act: Oil and Gas Leases

The Geological Survey may not change the royalty base of production on a retroactive basis where the royalty base, originally adopted, was within the ambit of the governing regulations.

Accounts: Payments -- Oil and Gas Leases: Production -- Outer Continental Shelf Lands Act: Oil and Gas Leases -- Regulations: Interpretation

Although an allowance for barging costs, from an onshore point (Burns Terminal) to another onshore point (Marrero) may be considered as within the ambit of "other relevant matters" within the scope of 30 CFR 250.64, the request for such allowance is properly denied, where found to be disconsonant with the public interest.

APPEARANCES: Melvin Spaeth, Esq., Arnold & Porter, Washington, D.C., and William W. Bell, Jr., Esq., of Houston, Texas, for appellants; David C. Branand, Esq., Office of the Solicitor, Department of the Interior, Washington, D.C., for the Geological Survey.

OPINION BY MR. FISHMAN

The Superior Oil Company and Transocean Oil, Inc., have appealed from a decision of the Director, Geological Survey, dated December 29, 1969, which affirmed an order of the Oil and Gas Supervisor, New Orleans, dated April 8, 1968, to the extent that the order:

1. Required payment of royalty on production from Superior's lease OCS-0797 based on an "average acquisition price" at an onshore terminal facility known as Burns Terminal into which Superior's

production is commingled and delivered with production from other offshore leases; and 1/

2. Failed to allow the deduction of certain barging costs incurred by the lessee in delivering oil to purchasers at points on the Intracoastal Canal downstream of Burns Terminal from the value of the oil for royalty computation purposes.

Oral argument was held before this panel on April 6, 1973.

Oil and gas lease OCS 0797 was issued effective as of May 1, 1960, to Superior 2/ and other companies, for all of Block 105, Eugene Island Area, as shown on official leasing map La. Map No. 4, Outer Continental Shelf Leasing Map (Louisiana offshore operations).

The Director's decision required appellants to pay an additional $33,000 in royalties for the period of 1964-1968. Mobil Oil Company, Continental Oil Company and Newmont Oil Company owned and utilized a pipeline, commonly called the MCN line, to transport production from offshore leases to onshore facilities and storage at Burns Terminal. Mobil was designated as the operator. The production from the leases was not of the same gravity and therefore crude oil of different gravities was mixed in the pipeline to form a commingled stream. Volumes of the commingled stream were allocated in the ratio of volumes introduced into the stream.

On March 20, 1964, Superior requested the Supervisor to give his approval for utilization of the MCN flowline to transport production from its leasehold to the Burns Terminal, stating in part:

> It is our opinion that the commingling of liquid production with the use of liquid meter measurement for allocation of field production and monthly well tests for allocation for well production within the field will provide reasonably accurate measurements, will not create

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1/ In essence, it is the position of the Geological Survey that its decision of December 29, 1969, directed that payment for royalties on production from lease OCS 0797 be made on the basis of the determination contained in a letter of April 9, 1964, to Superior, from the Oil and Gas Supervisor (hereinafter called the "Supervisor"), shown infra, or the price received by Superior from the sale of production, whichever is higher. Superior contends that the basis for royalty should be the actual sales price less barging costs from Burns Terminal for the period of 1964 to 1968. The decision below, at p. 7, indicates that the period involved was from May 1964 to August 1967.
2/ Superior owns a 90.5% interest and Transocean a 9.5% interest in the lease.

> inequities, and that the owner of any interest will have the opportunity to recover his just and equitable share of the reservoir content.

The Supervisor's response of April 9, 1964, recited in part:

> In accordance with 30 C.F.R. §250.68, the commingling of hydrocarbon liquids produced from lease OCS 0797 with commingled production in the MCN-Gulf flowline system is hereby approved. The use of liquid meters in lieu of gauge tanks for allocation of oil production to lease OCS 0797 is approved herewith under 30 C.F.R. §250.60. Settlement for royalty shall be based on the volume of liquids moved for the account of each lessee out of the Burns Terminal at the average value or "average acquisition price of the individual components of the commingled liquids." [Emphasis supplied.] 3/

Production of oil from lease OCS 0797 was reported by Superior as commencing July 9, 1964.

Approximately one year before Superior requested permission to commingle, Mobil, on March 27, 1963, wrote to the Supervisor as follows:

> At the firm request of your office, all producing operators [which did not then include Superior] by individual letters agreed to pay royalty on a commingled gravity of materials sold from Burns Terminals during the trial period. This was to be based on Mobil's postings. Approval was granted by your letter of August 14, 1962.
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> * * * * * * *
>
> With each company contributing crude oil of varying gravities plus high gravity condensate, a commingled liquid results at Burns Terminal. We must market this commingled product based on the average value of the individual components which is referred to as the `Average Acquisition Price.' 4/ It is our proposal to pay royalty based upon this method of valuation.

3/ The term "average value" is not defined other than in appellee's brief. See infra for discussion of term.

As shown infra, the term "average acquisition price" is defined in correspondence from the Supervisor to Mobil. It does not appear in the lease or regulations.

4/ The "average acquisition price," based upon Mobil's posted price was approximately $3.25 per barrel.

* * * * * * *

> [W]e will furnish you monthly copies of the attached Table I and Table II to support the calculation of the `Average Acquisition Price.' * * * [Emphasis added.]

Appellant asserts that it was unaware of that correspondence and of similar correspondence between the Supervisor and Continental, Gulf, and Newmont.

Superior proceeded in 1964 to pay royalties to the Geological Survey, based upon its actual sales price. 5/

5/ The Director's decision (page 7) discusses appellant's sales as follows:

"Until July 31, 1967, Hess Oil and Chemical Corporation purchased the crude moved for the account of Superior out of Burns Terminal upon delivery by Superior to the sales points and at the flat prices listed below:

Effective Date	Point of Sale	Flat Price
May 12, 1964	Hess Terminal, Marrero, La.	$2.95 per barrel
March 1, 1966	Shell's Norco, La., refinery	$2.97 per barrel
Nov. 1966 only	Shell's Deer Park, Texas, refinery	$3.025 per barrel
Dec. 15, 1966	Shell's Norco, La., refinery	$3.12 per barrel

"Superior computed and paid royalties based on the flat price received from Hess throughout this period with the exception of 4 months when royalties were paid on the average acquisition [sic] price as calculated by Mobil. Except for such 4-month period, such flat prices were always less than the average acquisition price.

"Since August 1, 1967, the appellant's production has been sold to Tenneco Oil Company for delivery into barges furnished by Tenneco at the barge loading facilities on the Intracoastal Canal. Tenneco currently pays $3.30 per barrel for 40 degrees to 44.9 degrees API gravity crude based on the gravity of the commingled mixture moved out of Burns Terminal. This price is considerably higher than the price that had been received for the same quality crude sold to Hess and, in addition, the seller is relieved of the necessity to deliver the crude at its own expense."

The Supervisor's letter of April 8, 1968, 6/ to Superior asserted, in essence, that the royalty base for production was the "average acquisition price" and was applicable from the time of the letter of April 9, 1964.

Thus, the question arises whether the letter of April 9, 1964, meaningfully purported to bind appellant to use the "average acquisition price" as its royalty base, and if so, whether such royalty base was within the ambit of the Supervisor's authority based upon the contract between the Government and appellants or the applicable regulations. The next question is whether assuming, arguendo, that the letter of April 9, 1964, was crystal clear (as urged by the Government) the parties put a "practical interpretation" on the contract which is binding upon them. The first question to be resolved is the meaning of the language of April 9, 1964, letter stating:

> Settlement for royalty shall be based on the volume of liquids moved for the account of each lessee out of the average value or average acquisition price of the individual components of the commingled liquids. [Emphasis supplied.]

6/ This letter stated in pertinent portion as follows:

"Our letter of April 9, 1964, provided that `Settlement for royalty shall be based on the volume of liquids moved for the account of each lessee out of the Burns Terminal and the average value or average acquisition price of the individual components of the commingled liquids.' Our letters of July 2, 1964, and September 23, 1964, acknowledged your Hess sales contract and the latter gave emphasis to it in disallowing a transportation deduction; however these were not intended to deter you from the manner of paying royalty as established in the April 9 letter. Our letter of June 10, 1966, acknowledged an amendment to the Hess contract and our letter of August 2, 1967, acknowledged a new contract with Tenneco, but here again the value did not change for royalty purposes. If these contracts prevailed for royalty usage the whole concept of an average acquisition price would be destroyed, because the result would be an inequity among operators and leases in the same system.

* * * * * * *

"Until a transportation allowance is approved, the value for royalty purposes is reaffirmed as the average acquisition price by Mobil calculations at Burns Terminal. It is figured using field gravities, Mobil's posting, and the respective field allocated volumes from terminal sales. Past average acquisition rates and your payment rates are quoted in enclosure (3)."

The term "average value" is defined in no place in the record, although appellee argues that it is merely synonymous with the term "average acquisition price." However, the word "or", separating "average value" from "average acquisition price," bespeaks the well-accepted doctrine, enunciated in American Ins., Co. v. First Nat. Bank in St. Louis, 409 F.2d 1387, 1390 (8th Cir. 1969), that:

> Two or more words in a contract connected by the word "or" generally have a separate meaning and it is ordinarily not persuasive for the insurer to argue that "the draftsman put in the words to mean nothing."

In In Re Rice, 165 F.2d 617, 619 (D.C. Cir. 1947), the Court stated:

> In statutory construction the word "or" is to be given its normal disjunctive meaning unless such a construction renders the provision in question repugnant to other provisions of the statute.

This disjunctive construction has been reiterated in cases relating to other writings, Shell Petroleum Corp. v. Royal Petroleum Corp., 135 Tex. 12, 137 S.W.2d 753, 758 (1940) (oil and gas transfer order); Gunn v. Phillips, 410 S.W.2d 202, 206 (Court Civil Appeals of Texas, 1967) (wills); Denver Plastics, Inc. v. Snyder, 160 Colo. 232, 416 P.2d 370, 373 (1966) (lease of real property); Houge v. Ford, 44 Cal. 2d 706, 285 P.2d 257, 260 (1955) (contingent attorney's fee contract); Elquest v. City of Phoenix, 68 Ariz. 277, 204 P.2d 1061, 1063 (1949) (land patent issued by the United States); and Denver-Chicago Trucking Co. v. Republic Drug Co., 134 Col. 461, 306 P.2d 1076 1078-1079 (1957) (bill of lading). We therefore conclude that the terms "average value" and "average acquisition price" are disjunctive, and not copulative terms. This brings to the fore the meaning of "average value".

In Re Alberti, 41 F. Supp. 380, 381 (D.C. S.D. Cal. 1941) quotes Bouvier in part as follows:

> The consensus of the best-considered cases is that * * * the value to be taken is the market value * * *. See United States v. General Petroleum Corp., 73 F. Supp. 225, 235 (1946), aff'd, Continental Oil Co., v. United States, 184 F.2d 802, 817 (9th Cir. 1950).

The term "value" when applied to property means market value. Orford v. Topp, 136 Mont. 227, 346 P.2d 566, 568 (1959).

In Bagdasarian v. Gragnon, 31 Cal. 2d 744, 192 P.2d 935, 940 (1940), the Court stated:

> Other cases and texts clearly show that "value" in connection with legal problems, ordinarily means market value. [Citations omitted.]

Thus, the term "average value" must be construed to mean the average fair market value, i.e., the market price of the components placed into the system by the appellants.

We have found no definition of "average acquisition price" other than that delineated in the gathering line system correspondence, of which appellants assert they were not aware, and which appellee asserts controls the case at bar.

Mobil's letter to the Supervisor, dated March 27, 1963 (Tab. N, appellants' appendices to brief) contains the only definition of "average acquisition price", i.e., "the average of posted prices on quantities determined at each meter point." Appellants assert that they had no knowledge of this letter during the period in issue and there is nothing in the record to rebut their assertion.

Under the "average acquisition price" concept, enunciated in Mobil's letter of March 27, 1973, Mobil's posted prices 7/ became the basic factor in determining the royalty base. Oral argument revealed that the Government, and also appellants, had no information concerning the establishment of the posted price. We note, in passing, that such a delegation of authority by the Geological Survey, particularly in the absence of standards, may be unauthorized 8/ by law. See Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Justice Cardozo, in his concurring opinion therein, stated:

> The delegated power of legislation * * * is not canalized within banks that keep it from overflowing. It is unconfined and vagrant, if I may borrow my own words in an earlier opinion. Panama Refining Co. v. Ryan, 293 U.S. 388, 440 [1935].

295 U.S. at 551.

7/ Counsel for appellants in oral argument suggested that Mobil's posted price was fixed arbitrarily and that it fluctuated. They also referred to a report of the Attorney General of July 1967 stating that it may have behooved integrated companies, e.g., Mobil, to fix higher posted prices.

8/ However, in view of the disposition of the appeal on other grounds, infra, the issue of unlawful delegation need not be decided.

As previously indicated, Superior commenced flowing oil production into the MCN line on July 9, 1964. Superior asserts that it endeavored to sell its portion of the oil at Burns Terminal, but neither Mobil nor any other purchaser was willing to buy that production at Mobil's posted price. This posted price exceeded the price paid to Superior by Hess Oil and Chemical Corp. for that oil, which fact was known to the Supervisor.

By letter of September 23, 1964, to Superior, the Supervisor in essence acknowledged without adverse comment that the sales price to Hess ($2.95 per barrel) was being used by Superior for establishing royalties. A memorandum to the files, dated October 28, 1964, from G. B. Woodward of the Geological Survey, describes a conference between representatives of Superior and of the Geological Survey, implicitly reaffirming the $2.95 sales price as the proper basis for royalties and requesting information as to the use of $2.934432 as the royalty base. On October 29, 1964, Superior sent a letter to the Supervisor, responsive to the discussion at the conference, and transmitting $604.83, as requested in the Supervisor's letter of September 23, 1964. The affidavit of William W. Bell, an attorney employed by Superior, dated March 3, 1970, recites that on March 13, 1968, he was present at a meeting in the Geological Survey offices in New Orleans, attended by Jake Lowenhaupt, Price McDonald, and George Woodward, all of the Geological Survey. His affidavit states in pertinent portion:

> Mr. Lowenhaupt stated that Superior's sales prices had been approved as the basis for calculating royalties on crude oil production.

A letter from the Supervisor to Superior, dated May 24, 1966, recites:

> We have received your check No. 35779 in the amount of $10,786.10 and your Form 9-153 for April 1966 on lease OCS 0797, Eugene Island Area, Block 100 field. Your Form 9-153 shows a price of $2.97 a barrel for oil during March and April 1966 <u>and you paid royalties based on this price</u>. Your contract with Hess Oil and Chemical Corporation dated May 12, 1964, states that a flat price of $2.95 a barrel will be paid for crude oil. If you have a new contract which has not been filed with this office, please furnish a copy of the contract for the disposal of oil in compliance with 30 C.F.R. 250.46. [Emphasis supplied.]

The record fully substantiates appellants' contention that until Superior received the Supervisor's letter of April 8, 1968 (insisting on the "average acquisition price," in contradistinction to the actual sales price as the basis for royalty computations), the Geological Survey had accepted appellants' actual sales prices as the proper basis for royalty computations. Was the acceptance of royalties by the Supervisor on the basis of actual sales prices within the ambit of his authority as fixed by applicable regulations and contract terms? What legal consequences attach to the Geological Survey's course of action? We proceed to consider these issues _seriatim_.

Sec. 2(d)(2) of the lease provided as follows:

> (2) It is expressly agreed that the _Secretary may establish reasonable minimum values for purposes of computing royalty_ on products obtained from this lease, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field, or area, to the price received by the lessee, to posted prices, and to other relevant matters. Each such determination shall be made only after due notice to the lessee and a reasonable opportunity has been afforded the lessee to be heard. [Emphasis supplied.]

The governing regulation, 30 CFR 250.64, recites as follows:

> §250.64 Value basis for computing royalties.
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> The value of production, for the purpose of computing royalty, shall be the estimated reasonable value of the product as determined by the supervisor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the lessee, to posted prices, and to other relevant matters. Under no circumstances shall the value of production of any of said substances for the purposes of computing royalty be deemed to be less than the gross proceeds accruing to the lessee from the sale thereof or less than the value computed on such reasonable unit value as shall have been determined by the Secretary. In the absence of good reason to the contrary, value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased lands are situated will be considered to be a reasonable value.

The provisions of 30 CFR 250.10, 250.20 and 250.64 make it crystal clear that the Supervisor has authority to fix the basis for royalty computations, utilizing the standards embodied in 30 CFR 250.64. We note that sec. 2(d)(2) of the lease and that regulation track closely in verbiage. For the purposes of this appeal we need not decide, however, whether "minimum values" in the former is synonymous with "estimated reasonable value" in the latter, and whether appellants were entitled to "a reasonable opportunity * * * to be heard."

Under 30 CFR 250.64 the Supervisor has authority to consider "all relevant matters" in fixing the royalty base, which cannot be less than the gross sales price accruing to the lessee, or less than the "reasonable unit value," established by the Supervisor. The "value computed on the basis of the highest price paid or offered at the time of production in a fair and open market for the major portion of like-quality products produced and sold from the field or area * * * will be considered to be a reasonable value * * *," in the absence of good reason to the contrary. Thus the royalty base could not be less than the actual sales price.

Appellants' contribution of oil to MCN line apparently constituted less than 3% of the oil going into the line. The other 97 plus % of production was apparently taken from Burns Terminal by the integrated producers (i.e., exploration, production, transportation, refining, and marketing companies) for their own use. 9/ Appellants urge that such disposition of the 97 plus % of production does not constitute "sales." We are of the view that even if such were considered "sales," a transfer of property between different arms of an integrated company cannot be considered to have been made " * * * in a fair and open market * * *," i.e., an arms-length transaction.

We find that such arms-length transactions only occurred with respect to a very minor fraction of the oil produced by appellants, and that during the period when appellants' sales price was less than the Mobil posted price, the former was a royalty base within the ambit of the Supervisor's authority to establish. 30 CFR 250.64. We now proceed to consider the legal consequences attaching to the Geological Survey's course of action in this matter.

The Supervisor's letter of April 9, 1964, was primarily a response to Superior's request to commingle production into the MCN line. It requires no exegesis to find that the language relating to royalty base was something less than a model of clarity. It is undisputed that the Supervisor accepted royalty payments on the basis of appellants' actual sales prices for a period of some four

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9/ Although appellee suggested that Newmont had made some sales from Burns Terminal, this assertion has no substantiation in the record. It is noteworthy that the Director's decision concedes that Superior's sale "was for an extended time the only sale to a third party."

years. The letter of April 9, 1964, sounded in contract. The lease incorporated by reference the applicable regulations of the Department. Permission to commingle was required under 30 CFR 250.68, and the royalty base was fixed under 30 CFR 250.64.

In essence, it is our view that the letter of April 9, 1964, constituted an element in the contract between the Government and Superior. In construing a contract, the doctrine of practical interpretation and application of the contract by the parties thereto is germane.

Corbin on Contracts, §558 (1960), discusses the doctrine as follows:

> In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement, make their own contracts; they can also, by mutual agreement, remake them. The process of practical interpretation and application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely a further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. In cases so numerous as to be impossible of full citation here, the courts have held that evidence of practical interpretation and construction by the parties is admissible to aid in choosing the meaning to which legal effect will be given.
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> * * * This concurrence [with the interpretation] may be evidenced by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when he knows that the first party is acting in reliance upon the interpretation. [Footnotes of citations omitted.]

Appellee, through the Supervisor, must be deemed to have concurred in the light of the three last standards.

Insurance Co. v. Dutcher, 95 U.S. (5 Otto) 269, 273 (1877), applies this doctrine:

> The practical interpretation of an agreement by a party to it is always a consideration of great weight. The construction of a contract is as much a part of it as anything else. There is no surer way to find out what parties meant, than to see what they have done. Self-interest stimulates the mind to activity, and sharpens its perspicacity. Parties in such cases often claim more, but rarely less, than they are entitled to. The probabilities are largely in the direction of the former. In considering the question before us, it is difficult to resist the cogency of this uniform practice during the period mentioned, as a factor in the case.
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> It was competent for the company, under proper circumstances, at any time to change its rule with respect to the future; but it could not affect vested rights acquired in the past, while a different rule prevailed.
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> Prior contracts must be carried out as they were when they were entered into. Neither party, in invitum as respects the other, can make any change. When it was proposed by the assurer to apply the new rule and practice in this case, the assured might well say, "non in haec federa veni," and insist upon the interpretation which prevailed in other like cases when the parties became bound to each other, and continuously, for two years later. The proper way to make the change was to employ such language for that purpose as would create certainty and exclude doubt. * * *

Even where there are two possible and reasonable meanings of a contract, a court, employing the doctrine of contra proferentem will adopt that one which is less favorable in its legal effect to the party who chose the words. Corbin, id. §559.

In WPC Enterprises, Inc. v. United States, 323 F.2d 874, 875, 877, 163 Ct. Cl. 1 (1963), the Court, in discussing government specifications in a contract, resolved the ambiguity in favor of the plaintiff, even where the contract "could reasonably be read in two conflicting fashions * * *" stating:

> This is a study in the toils of ambiguity. The parties put their names to a contract which, on the point crucial to this lawsuit, could reasonably be read in two conflicting fashions. Each signatory seized in its own mind upon a different one of these

> contradictory versions. Compounding that confusion, they discussed the issue with each other in such a way that each thought, but this time without good reason, it had obtained the other's acquiescence in its chosen reading. The impasse became unmistakably plain when it was too late. Our task is to determine on whom should fall the risk of such mutually reinforced obscurity.
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> * * * The Government, as the author, has to shoulder the major task of seeing that within the zone of reasonableness the words of the agreement communicate the proper notions -- as well as the main risk of a failure to carry that responsibility. If the defendant chafes under the continued application of this check, it can obtain a looser rein by a more meticulous writing of its contracts and especially of the specifications. * * *

In the case at bar, the Government argued that the acceptance by the Geological Survey of royalties based upon appellants' actual sales prices "were merely mistakes engendered by Superior's failure to comply with the instructions contained in the letter of April 9, 1964" and these mistakes "resulted in letters being prepared by accountants for the Supervisor's signature indicating that royalty payments based upon the sales price were being accepted." (Government's brief, p. 3) As counsel for appellants so aptly stated, government and industry could not function if a signing officer could abnegate responsibility on the basis that a subordinate prepared the document for his signature. Apart from that consideration, the memorandum to the files from G. B. Woodward, dated October 28, 1964 (Appellants' Appendix Tab K), demonstrates that the Supervisor was fully aware of the manner in which Superior had been calculating royalties. Because of the unqualified acceptance by the Supervisor of appellants' sales price as the basis for royalty payments over a period of some four years, it is obvious that no "mistake" was made, and that his course of conduct was a practical construction of the agreement between the parties. Maxwell-Davis v. Hooper, 317 Mass. 149, 57 N.E.2d 537 (1944); Austin Stone Industries v. Capitol Powder Co., 290 S.W.2d 689 (Texas Civ. App. 1956); see Lawrence Nat. Bank v. Rice, 82 F.2d 28 (10th Cir. 1936). Cf. Deloro Smelting & Refining Co. v. United States, 317 F.2d 382, 161 Ct. Cl. 489 (1963); and Jansen v. United States, 344 F.2d 363, 170 Ct. Cl. 346 (1965).

This Board has reiterated on many occasions that reliance by a private party on misinformation given to him by a federal employee cannot estop the United States or confer any right not authorized by law. Rudolph Chase, 8 IBLA 351 (1972); R. E. Hibbert, 8 IBLA 379 (1972); William Henry Weaver, 8 IBLA 313 (1972); Hiko Bell Mining & Oil Co., 6 IBLA 8 (1972); Mark Systems, Inc., 5 IBLA 257 (1972).

The case at bar is distinguishable since the royalty base accepted by the Supervisor for some four years was within the ambit of his authority. 10/ It is also clear that the Geological Survey could not change the royalty base on a retroactive basis, Continental Oil Co. v. United States, 184 F.2d 802, 831 (9th Cir. 1950); see

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10/ Sinclair Oil and Gas Company, 75 I.D. 155 (1968) is clearly distinguishable. Sinclair involves a situation where the Geological Survey initially required something "less than the royalty called for by the terms of the leases in satisfaction of appellant's obligations to the United States." Id. at 175. The Survey's misconstruction of the royalty terms of the lease had been based upon an erroneous interpretation of the Act of August 8, 1946, 30 U.S.C. §226(c) (1970). 75 I.D. at 157, 168, 171, 173. Thus, in Sinclair, the acceptance by the Geological Survey of royalties less than those required by law did not preclude the Government from subsequently requiring from the lessee the full royalties required by law.

In the case at bar, the Supervisor acted within the scope of applicable regulations in accepting payments based upon Supervisor's actual sales prices.

Sinclair, at 169 recognizes the distinction, albeit couched in terms of estoppel, as follows:

"The general rule is, of course, well established that neither the unauthorized acts of Government employees nor their laches can effect the rights of the United States or confer upon any individual or entity a right not authorized by law. Lee v. Munroe and Thornton, 11 U.S. (7 Cranch) 366, 369 (1813); United States v. Kirkpatrick, 22 U.S. (9 Wheat.) 720 (1824); Filor v. United States, 76 U.S. (9 Wall. 45, 49 (1869); Hart v. United States, 95 U.S. 316, 318 (1877); Steele v. United States, 113 U.S. 128, 134-135 (1885); United States v. Beebe, 127 U.S. 338, 344 (1888); United States v. Michigan, 190 U.S. 379, 405 (1903); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917); Wilber National Bank of Oneconta v. United States, 294 U.S. 120, 123-124 (1935); United States v. City and County of San Francisco, 310 U.S. 16, 31-32 (1940); United States v. California, 332 U.S. 19, 39-40 (1947). [Cf. 41 FORDHAM L. REV. 140 (1972).] On the other hand, the acts or omissions of officers of the Government, if they be authorized to bind the United States in a particular transaction, will work estoppel against the Government if the officers have acted within the scope of their authority. Ritter v. United States, 28 F.2d 265, 267 (3d Cir. 1928); Municipality of Rio Piedras v. Serra Garabis & Co., 65 F.2d 691, 694 (1st Cir. 1933); United States v. Coast Wineries, 131 F.2d 643, 650 (9th Cir. 1942). See discussion of both of these rules in Smale & Robinson, Inc. v. United States, 123 F. Supp. 457, 464-465 (S.D. Calif. 1954)."

Insurance Co. v. Dutcher, supra. However, it is clear that the Supervisor could change the royalty base prospectively within the ambit of regulatory and contractual criteria.

We therefore conclude that appellants, during the period in issue, paid royalties on the basis of actual sales prices received by them. We find this to be an acceptable value basis for computing royalties under the regulations. We now turn to consider the issue whether Superior is entitled to barging costs from Burns Terminal to Hess' terminal at Marrero, Louisiana.

In the proceedings below, appellants asserted that such transportation allowance "was authorized by Acting Solicitor Weinberg's Decision of August 2, 1963 * * *." This reference is to Shell Oil Company, 70 I.D. 393 (1963). Appellants are seeking a transportation allowance in shipping crude from Burns Terminal to Marrero, which lies in the outskirts of New Orleans, a distance of approximately 90 miles.

Shell, relied on by appellants, does authorize, but does not compel, the Secretary to make a transportation allowance in computing the royalty base. Shell, at 396, makes this clear:

> These factual studies and statistical analyses demonstrate the unusually complex transportation problems with which lessees are faced in the barging of the crude petroleum products from the Outer Continental Shelf leases in question. They will be of obvious relevance in determining reasonable barging costs in this case. They demonstrate that an allowance for barging costs is a relevant matter to be taken into account in computing the royalties due the United States here, where there is no bona fide established market at the field or area where the leases are situated. The precise factors affecting the barging allowance and the weight to be accorded any given element are matters within the discretion of the Secretary for determination as the public interest may require.

Although an allowance for barging costs is within the ambit of "other relevant matters" set forth in 30 CFR 250.64, it does not follow that an allowance must be made therefor. Rather that regulation means that in fixing the "value of production" the Secretary shall consider it, along with all other applicable criteria. It is to be noted that Shell concerned itself with offshore barging [see 70 I.D. at 395], and the special factors involved in such transportation are not present here.

In essence, it is appellants' position that since there was no arms-length market place at Burns Terminal, they are entitled to transportation costs to whatever place they shipped the crude for sale. The Government's brief at p. 9 states:

> The effect of granting the relief requested by Superior would be to require the allowance of transportation costs from the lease to the refinery which could be in Texas, Illinois or New Jersey.

Such a grant of relief would be disconsonant with the "public interest," set forth in Shell at 396. Moreover, we note that Burns Terminal is located in St. Mary's Parish in Louisiana. Within the same parish, a distance of approximately 15 miles, crude was produced at Sweet Lake during the years in issue. That crude was sold at $2.90 per barrel, the well-head price. Appellants received $2.95 per barrel for their crude, delivered at Marrero. It does not appear that appellants' price was out of line with the open market price then prevailing in that area and their price may have encompassed the transportation consideration.

Accordingly, the decision of the Director, Geological Survey, is reversed to the extent that it based the royalty on the "average acquisition price" retrospectively, and affirmed insofar as it denied a barging allowance from Burns Terminal to Marrero, and the case is remanded to the Director, Geological Survey, for action consistent with this decision.

Frederick Fishman, Member

I concur:

Edward W. Stuebing, Member

MRS. THOMPSON DISSENTING IN PART

This is a difficult case and this Board is handicapped because there is a hint of problems, issues, and facts which have not been raised or explored by the parties in any way meaningful to the primary questions raised clearly by Superior's appeal. The record before us is filled with evidentiary gaps and uncertainties. Neither Superior nor the Geological Survey have focused the main issues in this case within a conceptual framework of legal doctrines. The majority places resolution of one of the questions within a framework of contract construction rules, selecting the doctrine of practical construction by the parties and the doctrine of contra proferentem to support the conclusion that the actual prices received by Superior for the years in question, 1964-1967, are the reasonable values of the production from Superior's lease, rather than the "average acquisition price" determined by Survey.

I disagree. The facts do not warrant the application of those two rules of construction alone as the basis for the decision. There are other rules of contract construction which can support a different conclusion. Furthermore, the evidence is not sufficiently persuasive here to warrant a substitution of our judgment for that of Survey as to the reasonable value of the production from the lease during the years in question.

As shown in the Supervisor's letter of April 8, 1968, to Superior (Appellant's Appendix, Tab H), the difference between the Survey's use of the "average acquisition price" and the price received by Superior, varied per barrel from approximately 24 cents less under Superior's price in August 1964 to 13 cents less under that price in December 1966. By August 1967 Superior's price was approximately 4 cents more and thereafter continued at approximately that difference through 1967 and early 1968. According to Superior, the difference between using its contract prices and the "average acquisition price" and disallowance of certain transportation costs requires it to pay an additional $33,000 plus in royalties. It has not broken this figure down into an allocation of transportation costs and the difference between its sales prices and the "average acquisition price" required by Survey.

This case involves the commingling of oil and gas production in an approved distribution system (the MCN line) from offshore leases into the onshore Burns Terminal. Therefore, special considerations come into play which would not be necessary were the production from a lease sold directly without a commingling with that from other leases, because of the differences in the values of the oil and gas products flowing into the system from different leases at different times.

In 1963 after the MCN line and terminal facilities became a community gathering system, Mobil, the operator of the system, and the other participants in the system at that time, requested that the settlement for royalty in lieu of severance tax on production be based on the volume of liquids moved for the account of each lessee out of Burns Terminal at the average value or "average acquisition price" of the individual components of the commingled liquids. The average value, "average acquisition price," was described by Mobil in its letter of March 27, 1963, as "the average of posted prices on quantities (as corrected) and gravities determined at each meter point." When Superior in its letter of March 20, 1964, (Appellant's Appendix Tab D) requested approval to commingle production from its lease (OCS-0797) "to include Superior's production to the existing authorized system", it stated:

> It is our opinion that the commingling of liquid production with the use of liquid meter measurement for allocation of field production and monthly well tests for allocation of well production within the field will provide reasonably accurate measurements, will not create inequities, and that the owner of any interest will have the opportunity to recover his just and equitable share of the reservoir content.

By letter dated April 9, 1964, about which there has been much controversy in this case, the Supervisor approved this request and specifically added:

> Settlement for royalty shall be based on the volume of liquids moved for the account of each lessee out of the Burns Terminal and the average value or "average acquisition price" of the individual components of the commingled liquids.

During the time period in question here Survey reports the royalty basis for all of the lessees in the commingled system was determined and paid on the "average acquisition price" as established by Mobil for the commingled products. The only exception is Superior's reporting the value of its allocation of the commingled products upon its contractual prices received from third parties and paying its royalty on the actual sales price, rather than the higher "average acquisition price," as used by the other participants in the commingling system as the royalty base.

In justification for applying the same royalty basis, the average value, "average acquisition price", to all of the users in the commingled system, the Director of the Survey in his decision, which is the subject of this appeal, stated at 4-5:

> The value of the product from each lease connected to the system contributes to and affects proportionally the overall average value. Accordingly, royalty computed for the commingled mixture at the average acquisition price will then be the same as if computed on the volume and value of each of the components making up the mixture. If the value of the liquids from all of the leases connected to the system are used to determine the average value of the commingled mixture and a portion of the commingled liquids is marketed at a price other than the average value, the royalty paid for the portion marketed at such other price is not based on the actual value of the liquids and, therefore, cannot be equitable. Such a commingling system must function as a single system and royalties on all of the liquids moved out of the Burns Terminal be based on the same value to be equitable.

Superior disputes the equities involved here and contends that use of the "average acquisition price" does not reflect the true market value of the products. In its appeal it describes the flowline agreement:

> Basically, the agreement provides for monthly credits or billings to each party based on the extent to which the quality of its contribution to the commingled whole exceeds or is less than the average quality of the other participants' contribution. For the purposes of inter-company settlements, it is only necessary that the values assigned to the various grades of crude oil be generally <u>proportional</u> to their values in the market, rather than that the assigned values reflect the exact level of prices in the market. Stated otherwise, it is not essential that the standard employed for settlement purposes be the market price; it is essential only that the standard employed, whatever it may be, reflect the fact that crude oils of different hydrocarbon composition command different prices and that the standard recognize the differences in the amount and quality of oil contributed to the whole by each lessee. The parties to the MCN Flowline Agreement elected to use Mobil's posted prices at Burns Terminal as a convenient reference point for the relative values of crude oils of various gravities. (Tab C, p. 11, par. 4.) The Director cites no statement by any party to the agreement that Mobil's posted prices were the actual market prices of the products or represented their actual market value.

Superior contends that its agreement with the parties to the flowline system did not bind it, as it did parties under earlier agreements, to Mobil's determination of the "average acquisition price", that it had no knowledge of that prior agreement, or any knowledge or understanding of that term until after the Survey's action in 1968 requesting the recomputation of its royalty base. It contends that the proper basis for royalty determination is the price it received for its products, that its sales to Hess were the only sales made in a fair and open market, as the other producers in the system were integrated companies who took the production from their leases for their own use. 1/

Further, Superior contends that the Supervisor's letter of April 8, 1964, did not establish a royalty base because under the pertinent regulation, 30 CFR 250.64, the reasonable value of production cannot be determined until after production and sales, because the Supervisor must consider the price received for the product, prices received for like quality production in the same field or area, and other matters. Superior also contends, and the majority accepts, the proposition that the Supervisor could not retroactively change a determination of value of production for royalty purposes, citing Continental Oil Co. v. United States, 184 F.2d 802, 821 (9th Cir. 1950). 2/ Thus, we have the propositions put forward that the Supervisor may not prospectively prior to production determine the reasonable value of the production, and may not retroactively do so. Obviously, the question is raised when may the Supervisor make the determination? Or, in this case, did the Supervisor make a final determination of reasonable value of the production from Superior's lease prior to the 1968 decision?

With these questions posed, we come to my difficulties with the majority's application of the doctrine of practical construction here. This is an unusual contractual situation where there

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1/ Counsel for Survey raised a question on this at oral argument, indicating that another company was not an integrated company but paid royalty on the basis of the "average acquisition price". Superior apparently did not obtain a contractual commitment from the integrated companies when it entered into the pipeline system unconditionally agreeing to purchase the production from its lease at that price and, therefore, as it contends, was unable to sell to those companies during the time in question when there was an apparent downward turn in the market and they were sufficiently supplied by their own production and contractual purchase commitments.

2/ There have been statutory and regulatory changes since the events discussed in Continental which militate against the application of the sweeping and broad generality here.

is a clear contractual term in that the lessee must pay a royalty at a set rate upon the value of the production of the lease. The lease authorizes the Secretary of the Interior to establish a minimum value of the production. It also makes a part of its terms applicable rules and regulations insofar as they are not inconsistent with the provisions of the lease terms. No persuasive reason has been offered which would make inapplicable the provisions of 30 CFR 250.64, which authorizes the Supervisor to determine the value of production and indicates criteria to consider. Thus, within the ambit of reasonableness, the Supervisor may consider such criteria and make his determination, circumscribed by the limitation in the second sentence of that regulation that the value of production may not be less than the gross proceeds from the sale "or less than the value computed on such reasonable unit value as shall have been determined by the Secretary." 3/

While Superior would not recognize the Supervisor's letter of April 8, 1964, to be a determination by the Supervisor and a part of its contract, the majority uses that letter to create ambiguities which it resolves under rules of contract interpretation, and concludes that subsequent action by the parties was an interpretation of the letter.

If the reasonable value of production should more properly be determined after production upon consideration of all the regulatory criteria, rather than prospectively, this does not mean, however, that the Supervisor may not prior to production give notice to a lessee of the most significant criterion upon which royalty bases have been made in the field. This is true especially in the special circumstances of a commingled system, and especially if the criterion falls within the category of "other relevant matters" within the regulation.

Although as indicated by the majority, the statement in the April 8, 1964, letter on its face is not a model of clarity, in the context of Survey's administration and prior actions involving that particular oil and gas field and approval of the commingled system, there can be no doubt as to its meaning. In that context obviously "average value or `average acquisition price'" were used synonymously. The latter term merely further defined the former term. Clearly the meaning was that agreed upon by the lessees in the system and approved by Survey. While the majority places all of the consequences from the ambiguity it finds in the language upon Survey (and I make no excuse for the lapses by Survey personnel), Superior also appears to have failings in this regard.

3/ There is no indication in this case that the Secretary has prescribed any unit value apart from regulatory criteria.

It is difficult for me to understand why Superior would not make inquiry as to the meaning of the terms in the April 8, 1964, letter, even though the lease was not yet in production. The term "average acquisition price" was in quotation marks thus clearly showing it was taken from another context. This should have put Superior on inquiry as to its meaning in that context. Are alertness, careful attention to details, and freedom from error, to be expected only of Government personnel in this matter?

There is nothing in the record to indicate that Superior ever mentioned the statement in the April 8, 1964, letter or the term "average acquisition price" to Survey personnel or that there was ever any communication prior to 1968 between Survey and Superior as to that term. After production from Superior's lease commenced in 1964, memoranda and correspondence were exchanged between Superior and Survey personnel concerning required information and data as to Superior's production, including its contracts of purchase. While some were concerned with the price Superior received under its contracts, they did not indicate that other criteria would not be considered in establishing the reasonable value. From 1964 to the time of the Supervisor's decision in 1968, there were letters and memoranda concerning the deduction of certain transportation costs as one of the "other relevant matters" in determining the reasonable value of the production. In this appeal, Superior is still attempting to have a determination that certain transportation costs incurred from 1964 on be deducted. Unfortunately the record before us is incomplete, but it does not appear that issues raised by Superior in 1964 and subsequently 4/ were ever finally resolved before the Supervisor's decision of April 8, 1968.

In short, the question as to the reasonable value of the production was a matter which was in dispute between the Supervisor and Superior from the time Superior first reported its production information. I do not see how the course of conduct by the parties in these circumstances can be considered as construing any ambiguous term in their contractual relationship when there was a continual dispute as to the reasonable value of the production.

4/ For example, by letter of May 24, 1965, Superior requested repayment of "any and all sums and payments" made in excess of the amount it was lawfully required to pay. The record does not contain a specific response to this letter, although subsequent correspondence denied allowances pending further consideration and requested further information. A statement quoted by the majority, in an affidavit made by one of Superior's employees, referred to a meeting in March 1968, one month prior to the Supervisor's decision. Therefore, its evidentiary value is not impressive when subsequent action shortly thereafter refuted that alleged understanding.

Aspects of the doctrine of practical construction of contracts are not appropriate here. For example, it has been pointed out, that the doctrine may be invoked merely to interpret a meaning to a contract term or as a rationale for a court's decision of the consequences to be given to the action of the parties. 3 Corbin On Contracts §518 (1960); 4 Williston On Contracts §623 (3rd ed. 1961). Sometimes a term is so interpreted that there is, in effect, a novation of the original term. I find difficulties with that concept here as there would be no consideration given by Superior for any change in the Supervisor's determination of the reasonable value. The doctrine is sometimes used in the sense of an estoppel against one of the parties although there is authority that it should not be invoked where only one party misunderstands the term. Id. Corbin, supra, §558, at 259, with respect to the application of the doctrine of practical construction proposes a situation more akin to that here than cases cited for application of the doctrine and concludes the doctrine of practical construction should not be used. He states:

> One of the parties may carelessly make a wrong interpretation of the words of his contract, or may perform more than the contract requires (as reasonably interpreted independently of his performance). In some such cases he should be entitled to a restitutionary remedy, instead of being bound to continue an erroneous performance. The other party should never be permitted to profit by such a mistake unless he can establish an estoppel by proving a material change of position made in good faith. The rule as to practical construction does not nullify the equitable rules with respect to performance by mistake.

Superior has shown no injury by detrimental reliance upon actions by Survey personnel (other than the demand for the additional royalty which cannot be an injury) as would be necessary to establish an estoppel assuming it otherwise would be pertinent. Other rules of construction such as applying the local business usage, or a construction in favor of the public interest, may be weighed against the doctrine of practical construction and the doctrine of contra proferentem.

In discussing when the doctrine of contra proferentem is applied, Corbin, supra, §559 at 262 states that it is:

> After applying all of the ordinary processes of interpretation, including all existing usages, general, local, technical, trade, and the custom and agreement of the two parties with each other * * *.

As a practical matter, there is no reason substantiated in the record why the Supervisor in determining the royalty base would have or should have treated Superior any differently than the other users of the commingled system. One may safely infer that Superior is not completely naive or unfamiliar with the usual business customs and practices pertaining to a commingled system. Its claim of a lack of knowledge of the agreement by the other parties to the system and Survey is self-serving and does not afford a reason for a different value base for the years its price was less than that determined as the reasonable value of production from the commingled system.

Superior was required by the terms of the lease to submit copies of all contracts for the disposal of the lease products to the Supervisor. As stated in Sec. 2(f),

> Nothing in any such contract or in any approval thereof by the supervisor shall be construed or accepted as modifying any of the provisions of this lease, including, but not limited to, * * * the method of computing royalties due as based on a minimum valuation and in accordance with the regulations applicable to this lease. (Emphasis added.)

This provision also negates any notion that consideration of the contracts by the Supervisor, accounting, and other Survey personnel operated as a modification of the determination of the reasonable value made by the Supervisor under the regulations.

If we consider the question here as what was intended by the parties, it is apparent that Superior was given notice of the royalty basis by the April 6, 1964, letter. Even if ambiguous, it was sufficient to put Superior on inquiry as to its meaning. It is reasonable to assume from Superior's silence regarding the letter and its request to enter into the commingled system under the "existing authorized system", that there was more reason for the Supervisor to have been misled into believing Superior understood the context and meaning of the term and its application than that the converse should be true. Therefore, I cannot accept the contract construction applied by the majority. Cf. Amoco Production Company, 10 IBLA 215 (1973).

The real question raised by Superior is whether the Supervisor may properly determine the reasonable value to be higher than Superior's sales price during the time in question. Superior relies on the last sentence of 30 CFR 250.64 which provides:

> In the absence of good reason to the contrary, value computed on the basis of the highest price paid

> or offered at the time of production in a fair and open market for the major portion of like quality products produced and sold from the field or area where the leases lands are situated will be considered to be a reasonable value.

It contends that its sales were the only sales made in a fair and open market and there is no good reason for using a different value than its highest price. I disagree. Assuming arguendo its main assumptions are correct, there is good reason to use a different value. This is shown by the fact the royalty basis of 97% of the production in the same system was at the higher rate and because of the special considerations inherent where there is a commingled system. Though posted prices of integrated oil and gas producers may not necessarily represent the true market value of oil and gas production, Continental Oil Co. v. United States, supra, at 184 F.2d 831, it does not follow that posted prices or other prices determined by the integrated companies in agreement in a commingled system may not properly be considered as factors by the Supervisor under 30 CFR 250.64 in evaluating the reasonable value of production for royalty purposes. This is so especially where that price is higher than the proportionately-smaller volume sales of another company to a third party. The regulation, within the ambit of reasonableness, does not preclude the Supervisor from establishing a higher reasonable value than the highest price received "in a fair and open market."

If, as appellant suggests, the "average acquisition price" used as the royalty base for the lessees in the MCN system did not after 1967 or 1968 reflect the true market value, this would not be a reason justifying the lower royalty base for Superior during the three preceding years. 5/

Arguments raised by Superior with regard to its inability to sell to the integrated companies forcing it to sell at a price lower than their price during the three years in question, are akin to those raised by Continental Oil in the court case cited supra, where the non-integrated company found itself unable to sell at prices representing true values, but the Government required payment based upon the higher substantial market value. As stated by the Court:

> * * * We have then a contract which in terms obligates the lessee to pay a stated percentage of the value of the production. This is an undertaking

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5/ Survey should assure proper determinations of reasonable values as to the production from all of the lessees in the commingled system reflective of changes in market conditions.

which the lessee assumed without any express limitation or qualification. Whatever the percentage may be, the lessee must in any event pay a sum calculated with respect to the true value.

[13] The question here is whether this unexpected difficulty in regard to the marketing of oil produced by the non-integrated companies operates as an implied limitation upon or termination of this absolute obligation. The payment of royalty at the rate required by the district court's judgment is not an impossibility. At most it can be said to involve greater expense and to yield less profit than the lessee initially contemplated. "A promise will not be discharged, however, because the performance promised in return has lost value on account of supervening fortuitous circumstances unless they nearly or quite completely destroy the purpose both parties to the bargain has in mind." Williston on Contracts, Rev. Ed. Sec. 1954, page 5481. (184 F.2d 817)

* * * * * * *

The leases here bore evidence of the Government's concern lest those operators who owned or controlled pipe lines might thereby depress the market for oil produced and sought to be sold by others. By §3(c) the Government reserved "the right to require the lessee, his assignees or beneficiary, if owner or operator of, or owner of a controlling interest in, any pipe line, or any company operating the same which may be operated accessible to the oil derived from lands under such lease, to accept and convey at reasonable rates and without discrimination the oil of the Government or of any citizen or company, not the owner of any pipe line, operating a lease or purchasing oil or gas under the provisions of this act." We do not suggest that there is evidence that Continental by availing itself of this reserved privilege could have avoided the hardship which the prices posted by the integrated companies placed upon it. Its significance is that it demonstrates that the problem of sales of oil at adequate prices was within the contemplation of the parties and that this was one of the risks which the lessees were obliged to take. Cf. Baetjer v. New England Alcohol Co., 319 Mass. 592, 66 N.E.2d 798, 803; * * * Canadian Industrial Alcohol Co. v. Dunbar Molasses Co., 258 N.Y. 194, 198, 179 N.E. 383, 384, 80 A.L.R. 1173. * * *

> We think that when the leases were made the lessees assumed, as a matter of course that they would encounter no difficulty in selling their oil for what it was worth, and that the Secretary likewise assumed that his right to approve or disapprove proposed sales contracts, or to demand delivery of royalty in kind, would furnish adequate protection for the Government.
>
> [15] We are unable to perceive how the inclusion of these provisions in the lease or their inadequacy in the situation in which the parties found themselves when it appeared that the market had been rigged, has operated as a restriction or limitation upon the obligation of the lessee to account for royalty on the basis of the true values of the oil. Continental is not the first signatory of a contract to find that unanticipated subsequent events operated to lessen the value of its bargain. * * * [Footnotes omitted] (184 F.2d 817-18)

Likewise, I do not believe there was a discharge of Superior's contract performance by Survey's receiving partial payments of the royalties during the few years in question here. I am not persuaded that the rules of contract construction evoked by the majority nor any reason offered by Superior afford a proper basis for using a royalty basis for Superior less than that used for the majority of the producers in the commingled system. Note that regulations of this Department provide:

> <u>Effect of laches</u>; <u>authority to bind government</u>.
>
> (a) The authority of the United States to enforce a public right or protect a public interest is not vitiated or lost by acquiescence of its officers or agents, or by their laches, neglect of duty, failure to act, or delays in the performance of their duties. (43 CFR 1810.3)

I would follow the regulation in this case as to the effect to be given to any neglect or nonfeasance by Survey personnel, rather than strain to fit the facts into rules of contract construction which are not appropriate in the circumstances. There is a public interest and right in assuring that the Government obtains all royalties to which it is entitled.

I conclude on the basis of the information before us, that it was proper for the Supervisor to determine the reasonable value upon a higher posted or other "relevant matter" value established for the royalty base for the users of the commingled system than the price received by Superior. I would affirm the Survey's decision on that ground and dissent from the majority's opinion to that extent. 6/

I agree with the majority as to a disallowance of the barging costs as deductions from the value base. The onshore terminal of the community pipeline system is a reasonable stopping point beyond which allowance for further transportation costs appears unwarranted.

Joan B. Thompson, Member

6/ All that Superior has shown as an indicia of unreasonableness is the fact it had to sell its production at a lower price than the "average acquisition price" during the years in question. This fact alone is not sufficient. Without other evidence relating the values to the total market picture, comparing the extent of the differences in the prices with other pertinent criteria, and further information which would support a finding that the Survey's determination was not a reasonable value within the ambit of the regulation, I believe it should be sustained.